ORIGINAL

Before the

Federal Communications Commission

Washington, DC 20554

DOCKET FILE COPY ORIGINAL

In the Matter of	)	
	)	
Replacement of Part 90 by Part 88	)	
to Revise the Private Land Mobile	)	PR Docket No. 92-235
Radio Services and Modify the	)	
Policies Governing Them	)	
	)	
and	)	
	)	
Examination of Exclusivity and	)	
Frequency Assignment Policies of	)	
the Private Land Mobile Radio Services	)	

To: The Commission

MOTION FOR EXPEDITED PARTIAL STAY

MRFAC, Inc.

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July 7, 1999

SUMMARY

MRFAC, Inc. hereby moves for an immediate partial stay of the Second Memorandum Opinion and Order ("Order") in the above-captioned proceeding. In particular, MRFAC seeks a stay of the new rule which requires: (1) that frequencies which had been shared on a primary basis between the power, petroleum and railroad industries, on the one hand, and manufacturers, on the other hand, be coordinated solely by UTC, API or AAR, as the case may be; or (2) if those entities so choose, allowing MRFAC to provide initial coordination -- but only subject to their concurrence.

The Order is unlawful on two counts: The new coordination requirement was promulgated without proper notice as required by the Administrative Procedures Act; and, the new requirement is arbitrary and capricious.

As to the former, the Commission never proposed expanding the prior exclusive coordination prerogative enjoyed by UTC, API and AAR to include shared frequencies; nor is it a logical outgrowth of earlier re-farming decisions.

As to the latter, MRFAC has coordinated frequencies harmoniously with the utility, petroleum and railroad industries for years, and there is no indication that MRFAC has caused the type of interference problems which UTC, API and AAR have complained about. Moreover, the new rule is anti-competitive inasmuch as it deprives Industrial/Business Pool coordinators like MRFAC of their ability to compete on an equal footing with UTC, API and AAR. Thus, the decision lacks evidentiary support, and represents an unexplained and radical departure from the pro-competitive policies which have guided the Commission throughout re-farming.

The Order will inflict serious injury on MRFAC inasmuch as nearly one-third of the frequencies it has typically coordinated are impacted by the new rule.

Finally, a stay as to MRFAC will not injure the other coordinators or their industries. Rather, by granting the stay the Commission will achieve a more competitive marketplace and preserve public safety at the same time.

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To: The Commission

MOTION FOR EXPEDITED PARTIAL STAY

MRFAC, Inc. ("MRFAC"), by its counsel, hereby moves for an immediate partial stay of the Second Memorandum Opinion and Order ("Order on Reconsideration, or simply Order") in the above-captioned proceeding.[1] Specifically, MRFAC requests that the Commission stay, pending further action, that portion of the Order on Reconsideration which requires that frequencies which had been shared on a primary basis prior to the First Report and Order[2] between the petroleum, power or railroad industries, on the one hand, and manufacturers, on the other hand, either: (1) be coordinated by the American Petroleum Institute ("API");

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[1] Second Memorandum Opinion and Order, FCC 99-68, 64 Fed. Reg. 36258 (1999).

[2] In the Matter of Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them and Examination of Exclusivity and Frequency Assignment Policies of the Private Land Mobile Radio Services, Report and Order and Further Notice of Proposed Rule Making, 10 FCC Rcd 10076 (1995).

United Telecom Council, formerly UTC, The Telecommunications Association ("UTC"); or Association of American Railroads ("AAR"); or (2) be subject to concurrence from API, UTC, and AAR if those coordinators should choose to allow another entity to provide preliminary coordination.[3] The Order on Reconsideration was published in the Federal Register yesterday, July 6, 1999. The new rule is to go into effect just 30 days hence, i.e. August 5. As demonstrated below, a compelling case is presented for granting a limited stay of the rule.[4]

I. INTRODUCTION

MRFAC is a non-profit entity incorporated 21 years ago as the Manufacturers Radio Frequency Advisory Committee, Inc. MRFAC's purpose has been to perform frequency coordination and provide application assistance for Part 90 applicants. MRFAC continues today as one of the Commission's certified Industrial/Business Pool coordinators. MRFAC operates independent coordination facilities from offices located in Herndon, Virginia. Among Industrial and Land Transportation coordinators, MRFAC has ranked fourth out of 13 in terms of the number of applications coordinated for re-farming frequencies.

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[3] Order on Reconsideration at para. 9. API frequency coordination is performed by the Petroleum Frequency Coordinating Committee ("PFCC"), which is affiliated with Industrial Telecommunications Association. References to API should be understood to include PFCC, and vice versa. Besides expanding the coordination prerogative for the power, petroleum and railroad coordinators, the Order on Reconsideration determined to add the American Automobile Association, coordinator for the former Automobile Emergency Radio Service, to this group. Order on Reconsideration at para. 18.

[4] Except for channels in the 72-76 MHz range, manufacturers shared pre-consolidation channels primarily with the petroleum industry at VHF and with the power and petroleum industries at UHF (manufacturers shared both VHF and UHF frequencies with the forest products industry, whose coordinator, Forest Industries Telecommunications ("FIT") is also burdened by the new rule.) Manufacturers did not share channels with automobile emergency; the only channels shared with railroads were the 72 MHz low power, remote control frequencies which are typically not coordinated between the two services. Hence, this Motion focuses on the effects of the new rule insofar as it applies in particular to the petroleum and power industries. Charts showing the number of frequencies formerly shared by manufacturers, and the radio services with which they were shared, are attached.

MRFAC also serves as an advocate for the radio spectrum concerns of its members. MRFAC's membership is drawn primarily from America's manufacturing industry, many of its members representing the largest of U.S. corporations with extensive radio facilities. While MRFAC has participated in a great many Commission proceedings over the years, this represents the first time MRFAC has found it necessary to seek a stay of a Commission order. MRFAC would not do so now, but for the Order's manifest errors and the severe adverse consequences which the Order would visit upon MRFAC and principles of fair competition.

II. STATEMENT OF FACTS

In order to fully appreciate the errors in, and consequences of, the Order's new coordination rule, it is necessary to review some history.

Over two years ago, in the Second Report and Order in this proceeding, the Commission consolidated the then-twenty Private Land Mobile Radio Services into two pools: one for Public Safety and one for Industrial/Business users.[5] The Commission took this step to increase spectrum efficiency, which it characterized as its "primary goal" in the proceeding.[6]

At the same time, the Commission was concerned that interference could jeopardize safety-related communications in the railroad, power and petroleum industries. Accordingly, the Commission determined to require any entity seeking to use a frequency that had been allocated on an exclusive basis to one of these three services prior to consolidation to secure coordination from AAR, UTC or API as the case might be.[7] Frequencies shared by one of

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5 In the Matter of Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them and Examination of Exclusivity and Frequency Assignment Policies of the Private Land Mobile Radio Services, 12 FCC Rcd 14307 at para. 15 (1996).

6 Id.

7 Id. at para. 42.

these services with another service -- such as manufacturers -- prior to consolidation were not subject to this requirement; instead, applicants for these frequencies could use any of the certified Industrial/Business Pool coordinators.[8]

The Commission recognized that the transition to a competitive coordination marketplace was "a very complex undertaking" and stated that it was important to minimize public "confusion" concerning the new coordination procedures.[9] Hence the agency provided for a six-month transition period so that coordinators had "sufficient time to implement consolidation."[10]

Throughout, the Commission stressed its conviction that a competitive coordination market would "improve the quality of customer service through competition".[11]

The Order on Reconsideration radically changes this equation. Under the new coordination rule, Industrial/Business Pool coordinators like MRFAC will be required to forward applications for all frequencies formerly shared with the utility or petroleum industries to UTC or API, respectively; alternatively, if UTC or API elects (and only if they so elect), MRFAC might be allowed to perform a preliminary coordination subject to concurrence from those entities. Neither would be required to obtain concurrence from MRFAC. In reaching this result, the Commission greatly exceeded the scope of the determination made two years before in the

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8 Id.

9 Id. at para. 33 and para. 52.

10 Id. at para. 2.

11 Id. at paras. 38 & 40; see also, e.g., para. 51.

Second Report and Order, i.e. a determination to allow the three coordinators a prerogative only as to frequencies exclusively allocated to their Services prior to consolidation.[12]

In support, the Order on Reconsideration references a Petition for Reconsideration filed by API.[13] API asked the Commission to adopt protected contours for its members since few frequencies had been allocated exclusively to the Petroleum Radio Service prior to consolidation; hence, these were the only frequencies for which it had coordination exclusivity under the Second Report and Order. API did not ask for expansion of the coordination prerogative to include shared frequencies. And even as to its protected contour request, API did not seek relief for all petroleum radio systems (much less utility or railroad systems), but only for existing petroleum systems. API pointed out that

> "[M]ost petroleum and natural gas users are licensed on channels which are shared with other industrial services, principally the Manufacturers and Forest Products Radio Services, which do not normally have operations in the same geographic areas as petroleum entities. Thus, the majority of oil and natural gas systems are shared with a well-defined universe of conscientious licensees.
>
> . . . The same scenario will not hold true in an environment without interservice coordination rules, where any business entity is eligible to secure use of the frequency assignments."[14]

MRFAC submitted comments on API's Petition for Reconsideration. MRFAC did not oppose in principle the relief sought by API, but observed that protected service contours were at issue in connection with the Further Notice of Proposed Rule Making in the re-farming

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12 Id. at para. 42.

13 Petition for Reconsideration filed May 19, 1997.

14 Id. at paras 9-10 (emphasis added).

docket. MRFAC went on to note "the fact that the two user groups [manufacturers and petroleum] have shared these frequencies co-equally (and harmoniously) for many years".[15]

Neither UTC nor AAR sought reconsideration of the Second Report and Order's coordination rule.[16] Nevertheless, the Order extended the same shared frequency coordination prerogative to these parties on the grounds of "comparable treatment" to API.[17] Moreover, the new coordination rule encompasses all systems of these industries, both existing and future.

In reaching this result, the Commission expressly stated that API's request for protected service contours was "outside the scope of the instant Second MO&O."[18] (In the Regulatory Flexibility Act ("RFA") analysis attached to the Order the Commission also opined that the protected contour approach would entail "a complex requirement based on the computation of coverage contours," whereas "the goals of protecting these systems can be achieved through a simple concurrence requirement."[19])

At the same time the Commission continued to espouse the importance of "the new competitive coordination process."[20]

Finally, the Order on Reconsideration took pains to make clear what the Commission had not relied upon; namely, certain papers filed by API, UTC and AAR long after

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15 Comments on Petition for Reconsideration filed June 19, 1997 at 4.

16 UTC filed a Petition for Clarification; however, the Petition was directed at the trunking rules.

17 Order on Reconsideration at para. 9.

18 Id. at para. 8.

19 Id., RFA at para. 8.

20 Id. at paras. 20; 22 ("[c]onsolidation has created a more competitive marketplace for coordinators' services"); para 32 ("better service" expected to result from competition).

the statutory deadline for petitions for reconsideration. These included a request filed by API and UTC for a freeze on the acceptance of applications proposing to use any frequency that had been shared by their services prior to consolidation (or, alternatively, suggesting that applications could be accepted if UTC or API concurrence were obtained).[21]

They also included a petition for rule making filed by AAR, UTC and API. The petition seeks the creation of a separate frequency pool for the power, petroleum and railroad industries, the inventory for which would be stocked primarily by re-allocating about 60 percent of the frequencies formerly shared with the manufacturing and forest products industries for the exclusive use of power, petroleum and railroad.

The Commission held that both of these filings, i.e. the freeze request and the rule making petition, were "beyond the scope" of the Order on Reconsideration.[22]

Neither the freeze request nor the petition for rule making complained about MRFAC coordinations as having been the cause of interference referenced by these parties. Nor does MRFAC recall having otherwise received complaints from API or UTC about interference. On the contrary, the petitioners have noted positively that frequencies had been "compatibly" shared with manufacturers and forest products companies prior to consolidation.[23]

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[21] Emergency Request for Limited Licensing Freeze filed June 26, 1998.

[22] Order on Reconsideration at para. 27. The petition for rule making is at issue in WT Docket No. 99-87, comments for which are due August 2, 1999.

The Order does reference one additional input which it seems the Commission did reply upon, i.e. a letter from certain Members of Congress expressing concern about interference to the power and petroleum industries and asking the Commission to, in effect, do something about it. Id. at note 36. The letter was dated December 4, 1998.

[23] Freeze Request, at 4. Indeed, earlier in re-farming UTC suggested that the Radio Services should be consolidated along historic sharing patterns, taking note of the extensive frequency sharing between utilities and manufacturers, among others. See UTC Comments filed May 28, 1993 at 9. As the Attachment shows, UTC's observation about historic sharing patterns was correct.

Rather, the thrust of petitioners' concerns is that their users are "subject to interfering coordinations by frequency coordinators who do not apply the same type or level of analysis as UTC and PFCC, and that, unlike the "other generally compatible users (e.g., in the case of IW [Power], the Forest Products (IF), Manufacturers (IM), and Telephone Maintenance (IT) services), . . . high volume private carrier operation[s]" were being coordinated on these frequencies.[24]

As discussed below, the Order on Reconsideration is unlawful and should be stayed.

III. ARGUMENT

The Commission evaluates motions for stay under well-established principles. To support a stay, a petitioner should demonstrate: (i) that it is likely to prevail on the merits; (ii) that it will suffer irreparable harm if a stay is not granted; (iii) that other interested parties will not be harmed if a stay is granted; and (iv) that the public interest favors grant of a stay. Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958).

In evaluating the likelihood of success, a petitioner is not required to establish with absolute certainty that it will succeed. Population Inst. v. McPherson, 797 F.2d 1062, 1078 (D.C. Cir. 1986). Moreover, an agency considering a request to stay its own order need not confess error to grant the requested relief. To the contrary, it is enough that the agency recognize

[24] Freeze Request at 6 (emphasis added). See also UTC et al Petition for Rule Making, supra, citing instances of interference caused by private carrier systems which have "an economic incentive" to load their systems to the maximum. Id. at 10.

that it has ruled on concededly difficult issues and that the equities favor relief. As the D.C. Circuit explained in Holiday Tours,

> Prior recourse to the initial decision maker would hardly be required as a general matter if it could properly grant interim relief only on a prediction that it has rendered an erroneous decision. What is fairly contemplated is that tribunals may properly stay their own orders when they have ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained.

Holiday Tours, 559 F.2d at 844-45.

Furthermore, as the Commission recently made clear, it will "balanc[e]" the four interests involved in a stay request "in order to fashion an administrative response on a case-by-case basis". Universal Licensing System in the Wireless Telecommunications Services, FCC 99-129 ,WT Docket 98-20, released June 9, 1999, ¶ 4. Indeed, if there is a particularly strong showing on one factor, the Commission will grant a stay "notwithstanding the absence of another one of the factors." Ibid. As demonstrated below, MRFAC's Motion more than satisfies these requirements.

A. MRFAC is Likely to Prevail on the Merits.

MRFAC is likely to prevail on the merits for at least two reasons: first, the Commission failed to provide MRFAC and others adequate notice that it intended to change frequency coordination requirements for frequencies which had been shared with the petroleum, power and railroad industries prior to the First Report & Order. And second, the Order on Reconsideration is not supported by substantial evidence and represents an unexplained departure from prior policy.

1. **The Commission Failed to Provide Adequate Notice.**

The Administrative Procedures Act prescribes as one of its cardinal principles that "[g]eneral notice of the proposed rule making shall be published . . .[and] shall include . . . either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b).

The purpose of the notice requirement is to "give interested parties an opportunity to participate in the rule making through submission of written data, views, or arguments [i.e.. comments]. . . ." 5 U.S.C. § 553(c); see also Small Ref Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 547 (D.C. Cir. 1983) (the goal of rule making notice is to give the public an opportunity to influence a federal agency's decision affecting their interests). In other words, the final rule must at least be a "logical outgrowth" of the proposed rule and the notice must "fairly appraise [sic] interested persons of the subjects and issues the agency was considering." United Steelworkers, 828 F.2d at 317-18; Kooritzky, 17 F.3d at 1513. While a final rule need not exactly match the rule proposed (indeed, it should not if the comments received convince the agency to modify its approach), the agency must at least alert interested parties to the possibility that it might adopt a rule different from the one proposed. See, e.g., United Steelworkers of America v. Schuylkill Metals Corp., 828 F.2d 314, 317 (5th Cir. 1987); Kooritzky v. Reich, 17 F.3d 1509, 1513 (D.C. Cir. 1994).

A review of the relevant documents in this proceeding, including the Notice of Proposed Rule Making,[25] the First Report and Order, the Memorandum Opinion and Order,[26] the Second Report & Order, and the subject Order on Reconsideration, reveals absolutely no indication that the Commission was considering limiting coordination for frequencies shared by manufacturers for decades to API or UTC, or requiring their written concurrence prior to the coordination. In fact, from the very inception of this rule making the Commission favored an approach that applicants be permitted to select any of the certified coordinators for frequencies consolidated in the Industrial/Business Pool (save for the prerogative for exclusive frequencies granted API, UTC and AAR in the Second Report and Order). See Notice of Proposed Rule Making, 7 FCC Rcd at 8112. The first indication that coordination for frequencies historically shared by manufacturers would have to be performed by other entities (or at least receive their prior concurrence) arises in this Order on Reconsideration.

Moreover, the Commission cannot rely on petitions for reconsideration, much less comments of private parties as supplying notice. "[Parties] cannot, through a petition for reconsideration, expand the scope of a proceeding by asking the Commission to adopt a proposal which was not part of the original notice." In the Matter of Eligibility for the Specialized Mobile Radio Services and Radio Services in the 220-222 MHz Band, 12 FCC Rcd 9662, 9667 (1997) ("SMR Order"); see also Illinois Bell Telephone v. FCC, 911 F.2d 776, 783 (D.C. Cir. 1990). "As a general rule, [an agency] must itself provide notice of a regulatory proposal. Having failed

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[25] In the Matter of Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them, Notice of Proposed Rule Making, 7 FCC Rcd 8105 (1992);

[26] In the Matter of Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them and Examination of Exclusivity and Frequency Assignment Policies of the Private Land Mobile Radio Services, Memorandum Opinion and Order, 11 FCC Rcd 17676 (1996).

to do so, it cannot bootstrap notice from a comment." AFL-CIO v. Donovan, 757 F.2d 330, 340 (D.C. Cir. 1985). In any event, the only Petition for Reconsideration which was even remotely relevant (API's) sought an entirely different form of relief (protected contours); that Petition was confined to petroleum users; and it was limited to existing systems of those users. By contrast, the new rule includes three (actually four, counting AAA) industries, and includes all radio systems of those industries -- both present and future. And, while the API/UTC freeze request asked in the alternative for a concurrence right on shared frequencies, it was filed over a year after the deadline for petitions for reconsideration; the Order on Reconsideration thus properly ruled that the freeze request was outside the scope of the proceeding and, hence, it was "denied." Id. at para. 13.

Finally, the new coordination rule is not a logical outgrowth of any proposal made by the Commission. In reviewing "whether the final rule changes critically from the proposed rule . . . [courts] question . . . whether the agency's final rule so departs from its proposed rule as to constitute more surprise than notice." Air Transport Association v. FAA, 169 F.3d 1, 7 (D.C. Cir. 1999)(internal citations omitted). The court has repeatedly stated that "[a] final rule is not a logical outgrowth of a proposed rule when the changes are so major that the original notice did not adequately frame the subject for discussion." Omnipoint v. FCC, 78 F.3d 620 (D.C. Cir. 1996).

The Order cannot be viewed as a logical outgrowth of either pertinent document, i.e. either the Notice of Proposed Rulemaking or the Second Report and Order: The NPRM proposed as its "Option 1" that the radio services be consolidated into a few large pools with applicants free to select any coordinator within the pool. Id., 7 FCC Rcd at 8111-12. This is exactly what the Commission did in the Second Report and Order (save for the former exclusive

frequencies). By contrast, the Order on Reconsideration creates an exclusive coordination regime for any and all frequencies shared by the utility and petroleum industries prior to consolidation. Accordingly, the new rule represents "more surprise than notice." Air Transport Association, supra.[27]

2. The Commission's Action is Arbitrary and Capricious.

Apart from the lack of notice, the new coordination rule is unlawful as to MRFAC. Agency action is arbitrary and capricious when is not supported by substantial evidence based on a consideration of the relevant factors. BellSouth Corporation v. FCC, 162 F.3d 1215, 1221 (D.C. Cir. 1999); see also Greater Boston Television Corporation v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970), cert denied 403 U.S. 923 (1971). Moreover, the agency must demonstrate that its conclusions are based on a rational connection to the facts found, BellSouth, 162 F.3d at 1221, and explain any departure from past policies. Greater Boston, 444 F.2d at 852. The new rule fails on all counts.

First. As far as MRFAC is aware, there has been no suggestion to the Commission that MRFAC was responsible for the problematic coordinations referenced by UTC or API. Nor have UTC or API complained to MRFAC about the kinds of interference cases cited by those parties. On the contrary, all parties have agreed in the past that coordination relations between MRFAC and these coordinators historically have been satisfactory. Thus, there is neither substantial evidence, nor a rational connection, for the new rule as applied to MRFAC.

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[27] The fact that the Order on Reconsideration settled on the new coordination rule as less "complex" than protected contour analysis, does not save it: As noted above, logical outgrowth must be measured by the agency's own proposal, not a petition for reconsideration.

Second. The Order represents an unexplained departure from what has been a guiding principle of re-farming, i.e. that the introduction of competition would bring about better service and lower costs to coordination applicants. Instead, by adopting the new rule the agency will reduce competition between and among Industrial/Business Pool coordinators by artificially handicapping competitors to UTC and API. Unless there is a level playing field (i.e. unless UTC and API are required to obtain concurrence from MRFAC, for example), the Commission will have skewed customer choice in favor of certain select coordinators, and to the detriment of others. Any semblance of fair and meaningful competition is demolished in the process.[28] Despite this, the Order does not advert to the inconsistency with the Commission's pro-competition policies.

B. MRFAC and Its Customers Will Suffer Irreparable Harm Without a Stay.

Under any scenario, i.e. forwarding applications to the other coordinators, or waiting for their concurrence, MRFAC will pay dearly in terms of customer goodwill and lost business. On average nearly one-third of MRFAC's coordinations have been for the shared frequencies at issue here. Loss of this business would have serious negative effects on MRFAC's financial position.[29] Moreover, these losses are not merely competitive set-backs which can be replaced through normal competition. Requiring MRFAC to seek the prior written

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[28] Prior to consolidation the coordinators for these frequencies were required to obtain the concurrence of other coordinators in the pool. In the case of the VHF frequencies, for example, this meant that MRFAC primarily coordinated with FIT and API, and vice versa. But this is not nearly the same as saying -- post-consolidation in a competitive marketplace -- that MRFAC must refer its coordination business to API (or at least get its concurrence), for example, while API need not obtain concurrence from MRFAC. This result is particularly unfair inasmuch as certain of these coordinators have been making aggressive efforts to expand market share at the expense of MRFAC and other coordinators -- which is fine if all coordinators are allowed to play by the same rules.

[29] If desired, MRFAC is prepared to share financial data with the Commission subject to protections from disclosure pursuant to Rule 0.457.

concurrence of its competitors, much less referring its customers outright to them, literally strips MRFAC of its right to compete for business. This constitutes irreparable injury. See Iowa Utilities Board v. FCC, 109 F.3d 418, 426 (8th Cir. 1997) (possible loss of business and consumer goodwill qualifies as irreparable harm); see also Merrill Lynch, Pierce, Fenner and Smith v. Bradley, 756 F.2d 1048, 1055 (4th Cir. 1985) (when failure to grant preliminary relief creates the possibility of permanent loss, irreparable injury is established); Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co., 22 F.2d 546, 552 (4th Cir. 1994)(the possibility of permanent loss of business or of goodwill constitutes irreparable injury).[30]

Furthermore, MRFAC's customers will be harmed by the confusion that will ensue, e.g. coordination customers will be required to know that for applications on some frequencies MRFAC can perform coordinations, while for others it cannot -- few, if any, customers could be expected to have the information necessary to keep this straight. This is the sort of confusion the Commission said it wanted to avoid in effecting the transition to consolidation and competition.[31]

Finally, the very competitors in which the Order vests coordination exclusivity are pressing the Commission to wall off most of the frequencies at issue from U.S. manufacturers. See Petition for Rulemaking (RM-9405) filed by UTC, API and AAR at 22-23 (cited in Order at note 32). Under the circumstances, the most likely scenario is that manufacturers will find themselves engaged in disputes over the merits of this, that or the other objection lodged by

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[30] The Iowa Utilities Board stay expired upon issuance of the Court's judgment, 120 F.3d 753 (1997). The judgment on the merits was later reversed in AT&T Corp. v. Iowa Utilities Board, 525 U.S. ___, 119 S. Ct. 721 (1999).

[31] Second Report and Order at para. 33 and para 52.

UTC/API. See Order, para. 29. The net effect will be to deprive or at least significantly delay MRFAC customer access to essential spectrum resources. In short, MRFAC's customers will be irreparably harmed.

C. Others Will Not Suffer Substantial Harm by Grant of a Stay.

MRFAC, and the other coordinators (i.e. API and UTC), have shared the subject frequencies for years on a harmonious basis. MRFAC will continue careful coordination cognizant of the special concerns that these industries have -- concerns shared by MRFAC and its customers. Thus, staying the new rule as to MRFAC will not harm petroleum or power licensees.[32]

D. A Stay Will Serve the Public Interest.

The public interest will be served by a stay. Coordination customers will be spared confusion, delays and added costs. Public safety will be properly protected. Legal error in a Commission order will have been rectified pending further action. Finally, a truly competitive coordination marketplace will be achieved.

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[32] In this regard, MRFAC is amenable to discussing yet additional measures with API et al beyond the assurances provided above which could further enhance the shared interest in interference-free communications -- as long as such measures do not prejudice manufacturers as a user class or eviscerate principles of fair competition.

IV. CONCLUSION

For all of the foregoing reasons, this Motion should be granted on an expedited basis, and the new coordination rule stayed as to MRFAC pending further action to revise the rule.

Respectfully submitted,

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July 7, 1999

SHARED 450-470 MHz FREQUENCIES[1]

FREQENCIES (MHz)	IX	IF	IS	LX	IB	IP	IW	IT
451.175 - 451.675	10	10				10	10	10
451.700 - 451.750		2				2		
452.100 - 452.450[2]		8		8				
456.175 - 456.675[3]	10	10				10	10	10
456.700 - 456.750[4]		2				2		
462.475 - 462.525	3	2				2	2	2
467.475 - 467.525[5]	2	2				2	2	2

[1] Does not include paging or splinter frequencies.

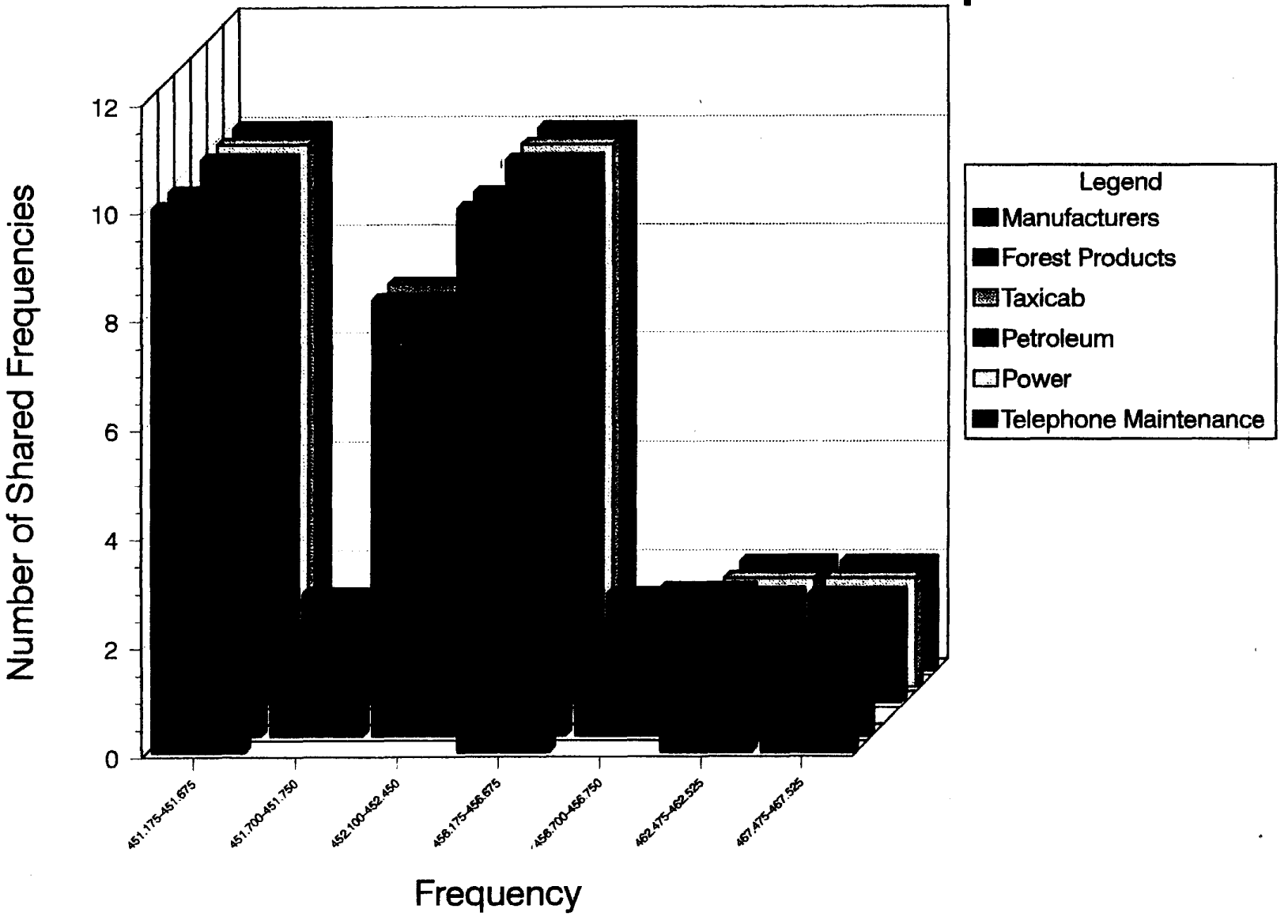
[2] These LX frequneices are shared by IF in four States: Washington, Oregon, Idaho and Montana.

[3] Paired with 451.175 - 451.675

[4] Paired with 451.700 - 451.750

[5] Paired with 462.475 - 462.525

Shared 450-470 MHz Radio Frequencies



SHARED 150 MHz FREQUENCIES[6]

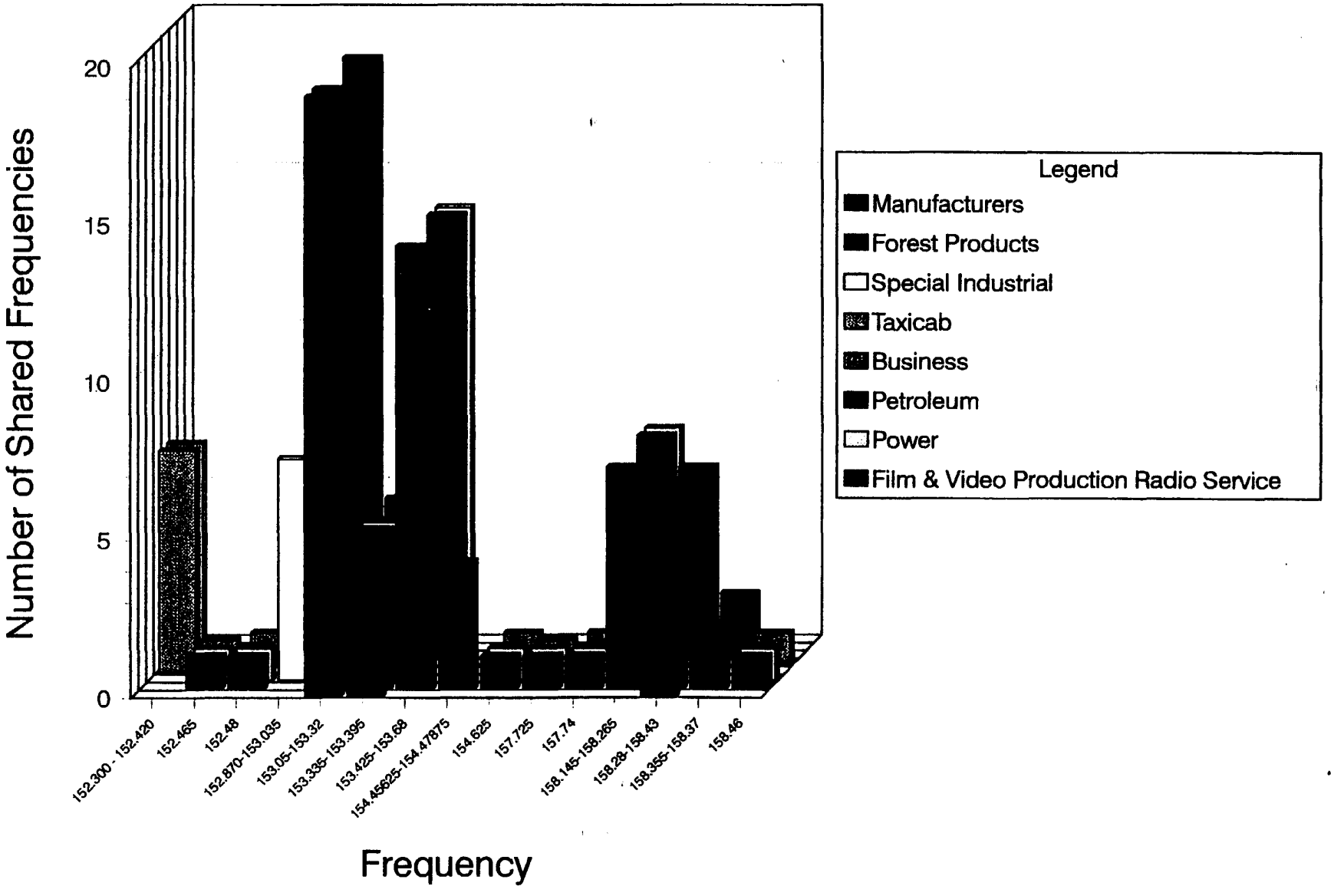
FREQUENCY (MHz)	IX	IF	IS	LX[7]	IB[7]	IP	IW	IM
152.300 - 152.420[8]				7	7			
152.465		1	1	1				
152.480		1	1		1			
152.870 - 153.035			7			1		6
153.050 - 153.320	19	19				19		
153.335 - 153.395	5	5	5			5		
153.425 - 153.680		14				14	14	
154.45625 - 154.47875		4						
154.625		1	1		1			
157.725		1	1	1				
157.740		1	1		1			
158.145 - 158.265		7				7	7	
158.280 - 158.430	6	6				6		
158.355 - 158.370		2				2		
158.460		1	1		1			

[6] Does not include paging or splinter frequencies.

[7] Frequencies shared by LX and IB are geographically separated, IB use being confined to rural areas.

[8] Paired with 157.560 through 157.680 MHz.

Shared 150 MHz Radio Frequencies*



*Graph does not include paging or splinter frequencies

DECLARATION

I, Marvin W. McKinley, hereby declare as follows:

I am President, MRFAC, Inc. This Declaration is offered in support of MRFAC's Motion for Expedited Partial Stay.

At my direction an analysis of coordinations performed by MRFAC has been conducted. That analysis shows that on average nearly one-third of MRFAC's coordinations have been for frequencies historically shared with the Power, Petroleum or Railroad Radio Services prior to consolidation. Any requirement that MRFAC refer applications for these frequencies to UTC, API or AAR, or secure concurrence from these coordinators without them having to do likewise, would severely damage MRFAC's position in the marketplace.

I am not aware, nor are MRFAC's employees, of any instance where UTC, API or AAR have complained to MRFAC about the kinds of interference problems which these parties have referenced in their filings with the Commission.

I have read the attached Motion for Expedited Partial Stay and the contents thereof are true and correct to the best of my knowledge and belief.

Executed under penalty of perjury this 7 day of July, 1999.

Marvin W. McKinley

CERTIFICATE OF SERVICE

I, Joseph C. Fezie, hereby certify that a true copy of the attached "Motion for Expedited Partial Stay" has been hand-delivered to the following, this 7th day of July, 1999:

Jeffrey L. Sheldon, Esquire
United Telecom Council
Suite 1140
1140 Connecticut Avenue, N. W.
Washington, D. C. 20036
Counsel for UTC

Wayne V. Black, Esquire
Keller & Heckman, L.L.P.
Suite 500 West
1001 G Street, N. W.
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Counsel for American Petroleum Institute

Thomas J. Keller, Esquire
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901 Fifteenth Street, N. W.
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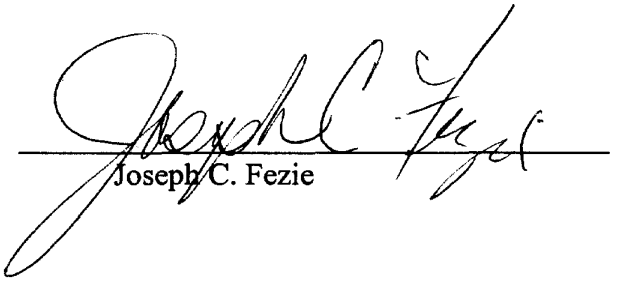
Counsel for Association of American Railroads

Michele Farquhar, Esquire
Hogan & Hartson, L.L.P.
555 Thirteenth Street, N. W.
Washington, D. C. 20004-1109
Counsel for American Automobile Association



Joseph C. Fezie